Statement of Commissioner C. Paul Smith
Proposing the Repeal of One Ethics Law,
Sections 15-853, et seq. of the State Government Article.

December 14, 2010

I propose the repeal of Sections 15-853 to 15-858 of the State Government Article of the Maryland Code. Whatever minor benefits this law attempts to provide are clearly outweighed by the several negative provisions of this law. The law is a bad law. Whatever benefits it seeks to establish are minimal and are primarily duplicative of other ethics laws; the law imposes a burden commissioners, staff and the public that is unduly burdensome, with penalties that are excessively harsh, and which chills and discourages speech that is protected under the First Amendment. There are at least three different parts of this law that are so defective that a repeal of the law is the best way to correct it. The mere fact that this is an "ethics" law does not mean that the law is a good one. I have no doubt that most people who have argued in favor of this law in the last few days have never read it. But I have read the law, and I have enough understanding of its application to know that it should be repealed for the good of Frederick County. I understand that the current perception of many people in the public is that some members of this board feel we are above the law, and that we don't need to abide by rules of ethical conduct. This is not the case. And the December 8th headline in *The Gazette* incorrectly stated that I propose to repeal ethics laws—plural. This is an error—my proposal addresses only one of several ethics laws. The mere fact that it is called and "ethics" law does not transform this seriously flawed law into a good law. Other people have expressed the feeling that now is not a good time to address correcting this law because it would reflect poorly on the Board. Well, even if that were true—it's too late now; I've already brought it up; I have been recklessly criticized with misrepresentation and falsehoods about this proposal, and a corrective response such as this is necessary. And in any event, the fact that some people may mischaracterize motives and oppose an action should not deter us from doing what is best for Frederick County. Repealing this one, law is the right thing to do. And now is the time to do it.

I will now point out the major problems with this law, and why the correction of these problems requires the law to be repealed. To those of you who have not read this law, this discussion may be a little difficult to follow. The mere labeling of this as an "ethics" law does not transform its flawed technical provisions into a good law. There are three major flaws with this law:

(1) **Overbreadth.** Section 15-855. The requirement to report the occurrence of ALL communications with any and every individual (other than with staff) that pertain to land-use applications, is too broad, too burdensome, and it impinges on protected speech;

(2) **Vagueness.** Section 15-855. The difficulty of ascertaining who and what conversations are subject to this law is an excessive burden on commissioners and staff, and is a waste of taxpayer dollars to regulate; and

(3) **Penalties.** Section 15-858. The penalties for violating this law are excessively harsh, chill protected and desirable speech, and violate freedom of political speech under the First Amendment.

1. Overbreadth. Section 15-855(b) provides that:

> A Board member who communicates ex parte with an individual concerning a pending application during the pendency of the application shall file with the County Manager a separate disclosure for each communication within the later of 7 days after the communication was made or received.

First of all it must be pointed out that there is a specific definition of "application" in this law that must be learned. Section 15-853(d) defines "application" to refer to five, specific types of land-use requests or applications. But the requirement to report communications pertaining to these applications is overly broad. Any and every conversation that pertains to such an application (except conversations with staff) must be reported. In other words, it is not just a commissioner's "closed door meetings" with applicants that must be reported, but every conversation with any and every member of the public regarding someone's application. The over-breadth of this requirement is a serious problem. Thus, the law is not narrowly tailored to track closed door communications between commissioners and applicants, but it requires tracking of every conversation that a commissioner may have with any and every member of the public wherever any aspect of the application may be mentioned. This over-breadth puts a considerable and unwieldy and constant burden on commissioners that advances no specific or significant interest.

2. Vagueness. Not only is Section 15-855(b) overly broad, but it is also too vague, for it is extremely difficult to ascertain whether or not many conversations are covered by the law. The mere fact that a land-use application is filed does not mean that a commissioner knows either that it was filed or what the application is about. In fact, most applications will never come before the commissioners. Nevertheless, Section 855(b) immediately imposes the requirement for commissioners to report all conversations with applicants and with the public that pertain to the applications. The vagueness of this regulation comes from the fact that in many, if not most cases, it is impossible to ascertain whether the substance of a conversation triggers the requirement to report.

3. **Penalties.** Section 15-858(b)(1) provides:

> (1) A person that knowingly and willfully violates this part is guilty of a misdemeanor and on conviction is subject to imprisonment not exceeding 6 months or a fine not exceeding $1,000 or both.

This penalty is a stiff one as it applies to land-use applicants and commissioners. It is excessively harsh as it applies to commissioners and in its effect on public discourse. Perhaps the law was intended to apply only to applicants, but the wording of the law appears to make the penalties applicable to commissioners, as well. The lack of any language excluding commissioners from being subjected to these penalties makes me concerned that I, as a commissioner, could face a fine or imprisonment for violating one of the overly broad and vague requirements of Section 15-855.

These three defects combine to make this law a bad law.

There is one part of this law that I do not object to—that is Section 15-854, which prohibits applicants from contributing to a commissioner's campaign while an application is pending, and which disqualifies a commissioner from participating in any consideration of such an application.

After I first became familiar with this law, every time I found myself involved in a land-use discussion, I began asking: "Do you have a land-use application pending?" But even that precautionary question was not sufficient: "Does anyone in this county have a land-use application pending that relates to this conversation?" I promptly asked the county staff for a list of the pending applications. And sure enough, our staff maintains such a list. As I and the other new commissioners were given initial briefings, the County Attorney and staff warned us to be vigilant about this particular ethics law because it was a "trap" for the unwary. The staff assured us that they would do all they could to help protect us from the dire consequences of this law. For this I thank staff. Once I got the list, I checked it to see if by any chance I might have received a contribution from any of these applicants. I didn't find any. But there is no need for an additional law to address campaign contributions. The names and amounts of all contributions are identified. This is sufficient. But in Frederick County we have imposed an additional restraint on ourselves. Now, take this list of pending applications. Right now, I don't know most of the applicants, nor do I know the substance of their applications. I could talk with them about parts of their application, and I wouldn't even know that the reporting requirement of the law had been triggered. And for most of the applications, I never will know about them, because most of them are resolved without any involvement on the part of county commissioners. This is another aspect of over-breadth that is un-called for, unnecessary, counterproductive, and a waste of taxpayer money.

Why do we even have such a ridiculous law? The answer is that the prior board urged our state legislators to enact the law. You might be interested to know that this law applies only to Frederick County, Maryland. No other county in the state is subject to this law. Well, I can certainly understand that; what group of county commissioners would want to pass a law that burdens them in such an unreasonable and risky way? _____ When other counties and other state legislators have learned of this "Frederick County" law, they can only shake their heads and wonder. They conclude that maybe the law will be good for the county that wants to secede from the State of Maryland. May I say again, this law is ridiculous.

Even if the excessively harsh and overly broad provisions of this law could be corrected, this law offers nothing helpful. All written and email communications that come in to Winchester Hall are available and discoverable through the Public Information Act and otherwise. All campaign contributions are reported and made available to the public. But by requiring the reporting the occurrence of any and every conversation with any individual that relates to the substance of every pending land-use application (of which there are currently about three dozen) is excessively broad, and therefore represents an unconstitutional infringement upon political speech. The reporting requirement is not narrowly tailored to conversations only with applicants. It is overly broad and burdensome. The result of this burden is two-fold: One, it discourages the commissioners from talking with constituents. I know of one commissioner who operated this way. It also discourages and serves to hinder constituents from

speaking with their elected officials. When this prohibition is coupled with the criminal penalties—fines and imprisonment—for its violation, this combination is a violation of freedom of speech protected by the First Amendment. Once again, the law is ridiculous and provides no benefit to the people. There is no need to track commissioners' conversations with non-applicants who speak with a commissioner about someone else's application.

What is the cost to the County of enforcing this law? It takes the time of the County Attorney, and of one particular staff attorney who is charged with being expert on this law. It also requires the County Manager to keep the commissioners informed of all pending applications, to collect the commissioners reports of *ex parte* communications, to report semi-annually all such disclosures, and it requires him to regularly remind us of this "trap" for the unwary.

This law has no redeeming virtue. It stands as a monument to fanatacism of the only county in the State of Maryland that would inflict this ridiculous burden upon itself.